

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Involuntary
Discharge of C.P., Petitioner, by St.
Lucas Care Center, Respondent

FINDINGS OF FACT
CONCLUSIONS-AND
RECOMMERDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on Wednesday, January 5, 1994 at 9:30 a.m., at St. Lucas Care Center. The record closed on January 19, 1994, upon receipt of the final written submission.

James R. Keating, Attorney at Law, 302 Northwest First Avenue, P.O. Box 762, Faribault, Minnesota 55021, appeared on behalf of the Petitioner, C.P.
Gary M. Peterson, Attorney at Law, at 322 Heritage Place, Suite 210, P.O. Box 932, Faribault, Minnesota 55021, appeared on behalf of the Respondent, St. Lucas Care Center.

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Commissioner, Minnesota Department of Health, 717 Delaware Street S.E., Minneapolis, Minnesota 55414 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues in this proceeding are whether the transfer or discharge of Petitioner from Respondent's nursing home is necessary to meet his welfare, whether the safety of the Petitioner is endangered at the facility, or whether the safety or health of individuals in the Facility is endangered.

Based upon all the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent operates St. Lucas Care Center (the Facility), at which it provides nursing home care to 119 elderly patients. It has a staff of 150 employees. The Facility has an Alzheimers unit on the second floor. 26

patients are in that unit. The unit is secure and has a high staff to resident ratio. The Facility is the only nursing home in the Faribault area offering specialized care of patients with Alzheimers disease.

2. Petitioner is 82 years old. He is a retired truck driver and retired human services technician. He has been married for 64 years and has resided in Faribault, Minnesota, his entire life. He has no living children. He has two cousins who live in Faribault.

3. On April 29, 1993, Petitioner was first admitted to the Facility. His wife had previously been admitted to the Facility and was a resident in its Alzheimers Care Unit. At the time of his original admission, the long term goal and discharge plan established in his care plan was placement at Deaconess Towers, an independent assisted living facility managed by and located next to the Facility. (Ex. 6). Petitioner's first Nursing Facility Resident Assessment and Care Screening (MDS) on May 13, 1993, found that he had some memory problem and was moderately impaired in cognitive skills for daily decision-making. He was able to communicate. He was not sad or anxious, and the only problem behavior was some physical abuse of his wife. He did not resist care, and appeared to be at ease in social settings. (Ex. 2).

4. From the first day, Petitioner did not want to remain at the Facility, but wanted to go home. (Ex. 22).

5. On June 3, 1993, Petitioner was discharged to Deaconess Towers. At that time, one of his cousins was acting as his guardian. The Deaconess Towers provided assistance with meals, cleaning, and laundry. However, they could not provide assistance in giving him medication. While residing at Deaconess Towers, Petitioner frequently visited his wife at the Facility. While there, he often requested assistance from the nursing staff with his medications.

6. On July 23, 1993, Luana Bauer was appointed as guardian of Petitioner and his wife. She is in charge of their financial matters as well as monitoring their living situation.

7. In August of 1993, the manager of Deaconess Towers informed Bauer that Petitioner could no longer reside at their facility because they were not able to meet his needs. The primary problem was Petitioner's need for assistance in taking his medications. Accordingly, On August 16, 1993, Bauer arranged for a nursing home preadmission screening for Petitioner. The preadmission screening report stated that it was appropriate for him to be

placed in a nursing facility with his wife. (Ex. 26). Bauer contacted several nursing homes regarding placement of Petitioner. Initially, the Resident facility did not wish to accept Petitioner. After a meeting between Bauer and Respondent's staff, a decision was made for his readmission to the Facility upon release from the hospital where he was being treated for pneumonia. The only other area facility willing to accept both Petitioner and his wife at the time was Cannon Falls Manor. But one of Respondent's staff members felt that would not be an appropriate placement for Petitioner because of his tendency to leave facilities and it was near a highway and not a secure facility.

8. On September 3, 1993, Petitioner was readmitted from District One Hospital in Faribault. On September 14, 1993, he was transferred to Owatonna Hospital because he wanted to leave and could not be controlled.

9. Petitioner was readmitted on September 20, 1993. The September 30, 1993, readmission assessment showed little change from the May 13, 1993 MDS. His memory recall has improved slightly, but he still had a memory problem and moderately impaired cognitive skills for daily decision making. His communication had worsened somewhat. He still had no problems with unsettled relationships, which includes the category of staff, roommates and residents. He had some conflict with family and friends. His only problem behavior was verbal abuse. No evidence of wandering, physical abuse, or socially inappropriate behavior was recorded (Ex. 3).

10. Petitioner takes Haldol, which is an antipsychotic medication which decreases his agitation. Petitioner was prescribed Haldol after his admission to Owatonna Hospital by Dr. Wilson, the treating psychiatrist there. (Ex. 12).

11. Due to legal requirements, Respondent's staff requested that the dosage be reduced because Petitioner appeared sedated. The dosage was reduced to 2 mg. per day by his treating physician or Dr. Rowe without contacting Dr. Wilson. (Ex. 13).

12. After the change in his medication, Petitioner was readmitted to Owatonna Hospital on October 9, 1993, after becoming upset over the sale of his home which resulted in his demanding to leave the facility. He had to be physically restrained by staff. (Ex. 13). During this hospitalization, his Haldol dosage was increased to 5 mg. daily, and then reduced to 4 mg. daily. The discharge plan specifically stated that the Haldol should not be reduced by more than .5 mg. per day at a time. (Ex. 13). The discharge summary of Dr. Wilson also states that the patient was eager to return to the Facility to be near his wife. (Ex. 13).

13. During his stay at Owatonna Hospital, October 9-12, 1993, Petitioner was diagnosed as follows:

AXIS I: Organic mental disorder, not otherwise specified
(probable Alzheimers disease and possible interictal affective partial
 complex seizures

AXIS II: None

AXIS III: History of temporal Lobe syndrome, asthma, mild
diabetes mellitus

AXIS IV: Psychological stressors: Severe (displacement in
living situation, dissatisfaction with living situation, wife very
ill with dementia)

(Ex. 13).

14. While at Deaconess Towers, Petitioner left and would return
voluntarily. On one occasion, he hitchhiked a ride along the highway
and hurt
himself trying to break into his old home. While on the less secure
first

floor of St. Lucas Care Center, some incidents of attempted elopement occurred. On two occasions he walked out of the building and staff retrieved him. Petitioner makes frequent statements, often angry, about being held prisoner and of his desire to leave. Petitioner refuses to wear a wander-guard bracelet.

15. Since Petitioner has been in the Alzheimers unit, no elopement has occurred. On November 19, 1993, the Petitioner was agitated and wanted his inhaler. He had self-medicated himself for years and this is a recurrent issue. Petitioner threw himself into the elevator when it opened causing some slight injuries to himself. No medical treatment by a physician was needed. No staff were injured. Petitioner made threats of elopement on November 29, 1993, including a threat to break a window, and he attempted to obtain the elevator access code. However, he never carried through on his verbal threats, and after approximately four hours, calmed down and became more relaxed without the need for any chemical or physical restraints.

16. The progress notes report several incidents in which the Petitioner was verbally abusive toward his wife. The care plans consistently state that Petitioner has difficulty understanding his wife's Alzheimers disease due to his own dementia. (Ex. 8-10). There have been a few times Petitioner has hit his wife. On May 9, 1993, the Petitioner hit her arm when she moved her wheel chair back. They then sat together and his wife asked him questions (Ex. 22). On May 26, 1993, he hit her arm trying to get her to sit down in her wheel chair. He had tapped her hands and arms repeatedly to have her sit down. Petitioner's wife is not ambulatory and is likely to fall when she gets up due to a coordination problem. (Ex. 23). On May 30, 1993, he hit her with a magazine on her hands because she was hollering and screaming. The Petitioner then followed the case plan by leaving the situation. (Ex. 22). On December 19, 1993, Petitioner swung his clothing belt out from him to get her attention. He wanted her to release the reminder belt which restrained him in his wheel chair. While swinging the belt, it made contact with his

wife's arm. (Ex. 23). Petitioner's wife has never been injured by Petitioner's actions.

17. Bauer has observed Petitioner and his wife hold hands. His wife will hold his hand and wring it, but he does not pull away. Bauer has observed Petitioner fix his wife's hair and clothes. They have a close and affectionate relationship. When Bauer has visited Petitioner while he has been hospitalized, his first question is, "How's [my wife] today?". Petitioner's first concern is his wife. Bauer does not believe that it is in the best interest of Petitioner that he be separated from his wife.

18. On November 14, 1993, at 9:45 p.m., a male resident called for help. The nursing staff found Petitioner on the floor with his glasses lying beside him. Petitioner stated, "He just hauled off and hit me." The other male resident was observed shaking his fist at Petitioner. No nursing staff observed what happened. Petitioner had slight red marks, but no injuries requiring medical attention. It is not known whether Petitioner had provoked the incident. (Ex. 23).

19. On November 26, 1993, at bedtime, one of the residents was wandering in the hallway, entered Petitioner's room and rummaged through his belongings. Petitioner was in bed and stated "Get out of my room right now. I'll push you to the floor if I need to." Staff observed the incident and

recorded the statement. (Ex. 23). Petitioner did not attempt to carry through with his threat.

20. On November 29, 1993, Petitioner attempted to leave the Facility, but staff physically blocked the doorway. Petitioner grabbed and twisted the arms of staff members. He grabbed hair of a staff member and a coat of a CNA. No medical treatment was needed for any staff members or for Petitioner.

21. On November 30, 1993 at 6:00 a.m., a staff member woke Petitioner up for a blood test before meal time. Petitioner has mild diabetes and periodic test levels are taken. Petitioner sleeps well. He threw clothes hangers and swore at the staff for waking him so early. He asked them to get his bill ready so he could go to a motel "where they don't get you up at 6:00 a.m." He then stood by the elevator and asked about his wife. (Ex. 23).

22. On November 30, 1993, at 7:15 p.m., the staff responded to Petitioner crying out. He was discovered in his wife's room, on the floor. Petitioner reported that he had been pushed to the floor by another male resident who was present and had landed on his buttocks. The other resident was removed. Petitioner was examined and no apparent injury was observed. But due to Petitioner's pain, he was sent to District One Hospital.

23. At about 8:00 p.m., on November 30, 1993, Petitioner was admitted to District One Hospital and was found to have a hip fracture. He later underwent hip surgery. During his hospitalization, he was verbally aggressive and abusive, which Dr. Urbi believed was due to the surgery and being in a new environment. He was given 10 to 12 mg. of Haldol daily, which was then slowly reduced as Petitioner adjusted. At the time of his discharge on December 13, 1993, Dr. Urbi prescribed Haldol of 5 mg. per day, plus 1 to 2 mg. every 4 to 8 hours, with a maximum daily dosage of 7 mg. (Ex. 15).

24. By a letter dated December 3, 1993, Respondent advised Bauer that it was necessary to discharge Petitioner from the Facility. The Notice of Discharge stated that the basis for the proposed action was that the Respondent believed that it could not provide for the Petitioner's safety in the Facility. The notice provided the addresses and telephone numbers of the Ombudsman for Older Minnesotans and the Minnesota Department of Health, Office of Health Facility Complaints and stated that Petitioner had a right to contest the proposed action. (Ex. 1).

25. Petitioner was going to be discharged on December 9, 1993, to the

Facility, but the Facility's care team wanted to have a psychologist evaluate
Petitioner regarding behavioral therapy and assessment as to whether
Petitioner could be returned to the Facility in a safe environment.
Respondent's staff called Dr. Urbi on December 10, and informed him that
they
felt that Petitioner should not be returned to the Facility for safety
reasons, that Petitioner will be potentially harmed by other residents as
well
as be harmful to himself and cited his periods of aggression. In an
addendum
to the Discharge Summary, Dr. Urbi stated that due to Respondent's decision,
he felt he had no other option but to transfer him to another nursing home.
Dr. Urbi reported that Petitioner was informed that he would be moved to a
new
nursing home and understood that it was because Respondent did not want him
back, although Petitioner had some reservations that he had been aggressive
or
confrontational. He informed the doctor that his only concern was that he
wanted to have his wife with him. (Ex. 15.)

26. The only statement from Dr. Urbi supporting Petitioner's transfer is a handwritten statement in response to Respondent's December 10, 1993, letter to Dr. Urbi stating they planned to discharge the Petitioner from their facility because they could no longer provide for his safety. Dr. Urbi did not state whether he agreed that Petitioner was endangered at the Facility. The statement merely recites the position of Respondent and then states that based on that position, Dr. Urbi feels that it is in Petitioner's best welfare to be transferred to another facility that can provide his needs and safety. (Ex. 14).

27. Bauer had two lengthy conversations with Dr. Urbi in which he never expressed any concern over Petitioner's safety or the safety of others because of Petitioner being at the Facility. She wants Petitioner and his wife to stay at the Facility and believes that they have the staffing to meet the needs of Petitioner.

28. On December 9, 1993, Glenn C. Holman, Ph.D., a licensed psychologist, met with Petitioner at District One Hospital. His report, Ex. 11, notes Petitioner's disparaging remarks about some of the staff at the Facility who have had to intervene when he tried to leave or got into a conflict with other residents. Dr. Holman reports that Petitioner has a basic combative personality style that is likely to intensify with any organic mental deterioration. He recommends that Petitioner's condition be reviewed psychiatrically and supports the use of psychotropic intervention to control his inappropriate behavior. Dr. Holman made no recommendation or conclusion that the Facility was unable to provide for Petitioner's needs in a safe manner or that other persons were endangered by Petitioner's presence at the Facility.

29. By a letter dated December 17, 1993, and received by the Office of Health Facility Complaints on December 22, 1993, Bauer, on behalf of Petitioner, appealed the decision to discharge him from the Facility. (Ex. 1).

30. Pending resolution of the appeal, Respondent agreed to accept Petitioner back into the Facility. Petitioner was readmitted on December 18, 1993.

31. On December 26, 1993, Petitioner was in the day room and became upset when staff members did not come when requested. He threw a stool approximately 40 feet across the day room and it came within three feet of the

nurses station. No one was injured. (Ex. 23).

32. On December 27, 1993, the Commissioner of Health issued a Notice of and Order for Hearing in this matter setting the hearing date for January 5, 1994, at 9:30 a.m. at the Facility. The notice was served upon Petitioner and the Respondent by mail on December 28, 1993.

33. Since Petitioner was readmitted to the Facility on December 18, 1993, after his hip surgery, there have been no further incidents of attempted elopement. Bauer believes the elopement has subsided somewhat, that he is beginning to adjust to the nursing home, and that the sale of the home has resulted in Petitioner having a lessened desire to leave the Facility. Respondent's Director of Nursing believe that elopement attempts have only subsided due to Petitioner's hip fracture.

34. Since Respondent notified Bauer of its intention to discharge Petitioner, Bauer has contacted 11 nursing homes in an attempt to find an alternative placement for Petitioner and his wife. The only nursing home that have two present openings is Cannon Falls Manor. That nursing home does not have an Alzheimers unit, or a secure unit. After the conclusion of the hearing, Bauer was notified that Petitioner's application was rejected. The only other possibility was the Good Samaritan in Albert Lea which is opening a new Alzheimers unit in the end of February. Bauer believes it is in Petitioner's best interest not to be separated from his home and community in Faribault and to be in close proximity of his wife, who definitely needs a specialized Alzheimers unit.

35. The parties agreed to submit the remaining medical records after the hearing as an exhibit. The Patient Progress notes from the Petitioner's last admission to the present contain the following notations regarding Petitioner's behavior:

12/30/93 loud and demanding of staff. Will swear at wife when she cries
or calls out for her deceased brother.

12/31/93 Called out for Bert on two occasions. Problems with bowels. Reassured several times.

12/31/93 Remains verbally abusive of wife. Loud and demanding of staff.
Voiding difficulty. Shifting from chair to walker.

1/1/93 No behavior problems. Pleasant and cooperative mood in the evening.

1/3/94 Noisy early in the shift. Pleasant and cooperative this a.m.
No behavior problems. Cooperative with staff. Using walker more.

1/5/94 No behavior problems. Appeared fairly oriented. Calls other residents by their names. Still has difficulty remembering staff's names.

1/6/94 No behavior problems in the morning. He continues to get upset
over wife's condition. Separated them and spent some one to one time with petitioner.

1/7/94 No behavior problems

1/8/94 No behavior problems. In the afternoon, he sat next to wife holding her hand. That evening, his behavior was appropriate.

1/9/94 In good spirits this evening. More tolerant of wife despite
more agitated behavior from wife.
(Ex. 27).

CONCLUSIQNS

1. The Commissioner of Health and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and sections 1819(c)(2), and 1819(e)(3), 1919(c)(2) and 1919(e)(3) of the Social Security Act.

2. The Notice of and Order for Hearing issued by the Department in this matter was proper and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. The burden and proof in this proceeding is upon the nursing facility to prove the facts at issue by a preponderance of the evidence. Minn. R. 1400.7300, subp. 5.

4. Pursuant to 1819(c)(2)(A) and 1919(c)(2)(A) of the Social Security Act as restated in 42 C.F.R. 483.12(a)(2), a skilled nursing facility must permit each resident to remain in the facility and not transfer or discharge the resident from the facility unless-

- (i) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met at the facility;

- (iii) the safety of individuals in the facility is endangered;

- (iv) the health of individuals in the facility would otherwise be endangered; . . .

In every case, the basis for the transfer or discharge must be documented in the resident's clinical record. In the cases described in clause (i), the documentation must be made by the resident's physician, and in the cases described in clause (iv), the documentation must be made by a physician. 42 C.F.R. 483.12(a)(3).

5. Under 42 C.F.R. 483.12(a)(6), the Notice of Discharge by the Facility must include notice of the resident's right to appeal under the state process and must include the name, mailing address and telephone number of the state long-term care ombudsman. The notice must include the reasons for the transfer or discharge. The notice of Discharge must also include the location to which the resident is transferred or discharged.

6. The Respondent did not comply with the notice requirements set forth above. The notice included no reference to any other facility to which Petitioner would be transferred. Moreover, at the hearing, Respondent argued that Petitioner's transfer was justified under clauses (i), (ii) and (iii), set forth above, while the Notice of Discharge referred only to the Facility's

inability to provide for Petitioner's safety in the Facility.

7. A facility is required to identify alternative settings and that all reasonable intervention alternatives have been exhausted prior to discharge when the reason for discharge is that it is necessary for the resident's welfare. in tthe matter of the Involuntary Discharge of M. E. Petitioner by Nile Health Care Center Respondent OAH No. 1-900-5189-2 (March 25, 1991)

In the Matter of the Involuntary Discharge/transfer of D. P. Petitioner by Woodside Convalescent Center Respondent OAH No. 56-0900-6581-2 (June 23, 1992, adopted by Commissioner May 28, 1993).

8. Respondent has not proved by a preponderance of the evidence that a transfer or discharge is necessary for Petitioner's welfare and that Petitioner's needs cannot be met in the facility. Nor is there documentation of such in Petitioner's clinical record by his physician.

9. Respondent has not proved by a preponderance of the evidence that the safety of individuals in its facility is endangered by Petitioner's presence.

10. Respondent has not proved by a preponderance of the evidence that the health of the individuals in the Facility would otherwise be endangered. Nor is there any documentation of such in Petitioner's clinical record by a physician.

Based upon the foregoing conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the commissioner of Health:

Grant Petitioner's appeal and prohibit his proposed discharge or transfer from the Facility.

Dated this 17th Day of February, 1994.

Steve Mihalchick
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 20,440, 20,437, 20,436.
No Transcript Prepared.

MEMORANDUM

One of the main issues in this proceeding is whether the medical records provide sufficient support for Respondent's request to discharge Petitioner. Respondent has failed to show by a preponderance of the evidence that the treating physician determined that Petitioner's discharge is necessary for his own welfare and that his needs cannot be met by Respondent. The handwritten

statement from Dr. Urbi, Petitioner's current treating physician, is ambiguous. The physician appeared to be relying on the Respondent's assessment, rather than making an independent assessment of what was in the Petitioner's best welfare. His statements in the December 13, 1993, discharge summary affirm that. Respondent did not call Dr. Urbi as a witness to clarify his statement. The guardian testified that Dr. Urbi had never told her that

Petitioner was endangered as a resident at the Facility or that his behavior endangered other residents. 42 CFR 483.12(a)(2) requires the Respondent to provide documentation by his treating physician that the discharge is necessary for the resident's welfare. Respondent has not met this burden.

The Respondent has not shown by a preponderance of the evidence that Petitioner's needs are not being met at the facility. The Respondent is able to monitor Petitioner's medications and meet his physical needs. When he has been recovering from hip surgery, they have assisted him when necessary. The Respondent is also able to provide sufficient staffing to provide some one-to-one time with Petitioner. Petitioner enjoys playing chess with the staff. Petitioner reacts to external events by becoming agitated. The level of agitation depends upon the triggering event and his current dosage of Haldol. While Petitioner takes up more staff time when he acts out than other residents, it appears that his needs are being met by the facility. The Respondent presented evidence that they could not protect Petitioner from injury, such as his recent hip fracture. However, there is no evidence that his needs could be better met at another facility. While it may be true that Petitioner is aggravated by the behavior of the other residents who have a more severe form of dementia, the facility has additional staff to try to assist him with these issues and work on providing him with activities for additional stimulation. If wandering or elopement remains a problem, Petitioner is in need of the security features of the Alzheimers unit at the Facility. If Petitioner's threats of elopement lessen, the staff can attempt to involve him with activities on the first floor. If he consents to wearing a wander guard bracelet, an attempt could be made to place him on the unsecured first floor. Petitioner would still be near his wife and could visit her as often as he wished. It appears that the Facility is equipped to handle Petitioner's needs.

The Respondent did not present other possible alternatives for Petitioner's placement which is required when the transfer or discharge is based upon the resident's welfare. in the Matter of the Involuntary Discharge/Transfer of M.E. Petitioner, by Nile Health Care Center, Respondent. MDH No. D-1990-1, OAH No. 1-900-5189-2 (March 25, 1991.)

Testimony was presented that foster care was a possibility. However, foster care had been ruled out when Petitioner received his preadmission screening. The Respondent suggested that facilities outside of Faribault would be better for Respondent, but no medical documentation supporting that position was submitted. Additionally, no specific facilities were provided.

Respondent also has a duty to show that all reasonable steps have been taken to address the resident's behavioral problems. Jig, In the matter of the Involuntary Discharge/transfer of M. V. Petitioner by Trevilla of Robbinsdale, Respondent, MDH No. D-1993-1, OAH No. 8-0900-7363-2. In this proceeding, Respondent introduced into evidence care plans which set out goals and methods to handle Petitioner's behavioral problems. One problem has been that Petitioner has not been a resident at the Facility for any prolonged period of time. It is unclear from the record whether a more stable period of residency would aid in Petitioner's adjustment and in reducing his behavioral problems. There were no records of quarterly assessments because Petitioner has not been physically present at the facility for three consecutive months. It is premature at this time to determine whether he will adjust to his new home. In addition, the doctors are still attempting to achieve a balance with his Haldol dosage which will reduce his agitation without causing sedation.

previously, his Haldol dosage was decreased by 3 mg within a short period of time. Respondent became very agitated resulting in a second hospitalization at Owatonna Hospital. Dr. Wilson, Petitioner's psychiatrist, then specifically stated that the dosage could only be reduced by .5 mg. daily.

The Respondent did not contact a psychologist until after the Facility had issued the discharge notice. The examination by Dr. Holman, Ph.D. Licensed Psychologist, occurred during his hospitalization for his hip fracture. The written assessment is that Petitioner should continue to take Haldol and that his personality style is not quickly responsive to behavioral interventions. Dr. Holman does not state that Petitioner should not be returned to St. Lucas Care Center. The report simply confirms that Petitioner has behavioral problems that need to be addressed. The report does not set forth steps for Respondent to follow to assist in handling Petitioner's behavioral problems. It is premature for Respondent to state that discharge is necessary when they have not attempted to utilize the services of a psychologist, such as Dr. Holman to work with the staff and Petitioner.

An additional consideration is the absence of a suitable nursing home facility within the Faribault area. The guardian contacted eleven nursing homes in a 50 mile radius and there were no openings for Petitioner. After the hearing, Cannon Falls Manor rejected Petitioner's application. The Petitioner was previously found to need a nursing home rather than foster care. No evidence was presented to suggest that his mental impairment has improved which would make foster care feasible. No other nursing homes in the area have a specialized Alzheimers unit. No one disputes that Petitioner's wife needs an Alzheimers unit. Both parties also agreed that Petitioner needs to be in a secure facility, or he must wear a wander guard. Petitioner has lived in Faribault his entire life. Respondent has suggested that it may be better for Petitioner to be in a remote nursing home where he would not have the same desire to go into town. But that seems contrary to the conventional wisdom that the elderly should be maintained in settings as close to "home" as possible.

Respondent raised the issue of whether the health of individuals in the facility is endangered by Petitioner's presence. This issue was not contained in the discharge notice, but was raised for the first time at the contested proceeding. There is no documentation of this by any physician. The health of any individuals that is threatened by Petitioner's presence arises from his occasionally aggressive behavior and can be dealt with by Respondent.

Respondent also raised the issue that the safety of other residents are endangered by Petitioner's presence. The Respondent has a heavy burden to

establish that a discharge is warranted because the Petitioner is endangering the safety of others in the facility. In a previous discharge proceeding, a petitioner grabbed and twisted the arms of residents, causing light bruising and scratches, and hitting a wheelchair-bound resident in the face causing a superficial scratch. The incidents occurred over a two year period. The resident also was verbally aggressive. The ALJ's order denying the discharge was adopted by the Commissioner. In the Matter of-the Involuntary Discharge/Transfer of D.P.. Petitioner, by Woodside-Conyalescent-Center Respondent. OAH No. 56-0900-6581-2 (May 28, 1993). hot also, In re Discharge of J.S., by Ebenezer Hall OAH No. 2-0900-6690-29 (July 28, 1993). In this proceeding, none of the other residents have been physically injured by Petitioner. While Petitioner has made physical contact with his wife, no

evidence was presented that she suffered any type of injury. Petitioner's actions appear to be triggered by frustration toward his wife's condition. Evidence was also presented describing their affectionate relationship and his concern over her welfare. The evidence does not support a finding that she is unsafe in Petitioner's presence. The only physical contact with staff occurred when restraining him from leaving the building. The secured unit has additional staffing to handle extra problems associated with persons suffering from dementia. The evidence presented does not sufficiently meet the Respondent's burden to show that the other residents or staff are endangered by Petitioner's presence.

SMM